ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	R300 No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, NOVEMBER 20, 2009
2:25 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
CHRONIS HEARING

CONCLUDING REMARKS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

NOVEMBER 20, 2009
2:25 P.M.

CHRONIS HEARING

APPEARANCES:
FOR THE STATE: MR. JOE BUTNER.
FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY HAMMOND, AND MS. ANN CHAPMAN.

THE COURT: This is, again, in the State versus Steven Carroll DeMocker, CR 2008-1339. We are set for concluding remarks in the Chronis versus Steinle style hearing.

Mr. Sears.

MR. SEARS: Thank you, Your Honor. And I want to thank you, again, on behalf of Mr. DeMocker and his family and all the defense team for this opportunity to have fully explored the probable cause issues as it relates to this matter proceeding as a capital case. I think this is an extraordinary hearing. This is new ground, certainly for us, and probably for the Court.

THE COURT: Before we go to that, do you want Mr. Butner to go first? I mean, if it's like a Chronis -- like a preliminary hearing, typically that is what would happen.

MR. BUTNER: I was just looking at the case, Judge, to see and answer that very question. It seems to me that the State is supposed to go first.

THE COURT: I don't want to offend anyone, Mr. Sears.

MR. SEARS: I'm a lawyer, sir. I am not easily offended.

THE COURT: I recognize that.

Let's have, Mr. Butner -- if you wish to go first and not waiving anything, I think that probably would make more sense.

You can leave all of that, John, if you want, unless Joe needs the space.

MR. BUTNER: That is fine. Thanks, Judge.

As the Court has stated, and we all have numerous times, this is a probable cause hearing. That is a hearing to determine whether there is sufficient evidence to support the allegations of aggravators for the jury to find the death penalty, the standard being more probable than not and whether there is substantial evidence.

Going to the F-13 aggravator, first, Judge, kind of in reverse order. That's the aggravator that talks about whether the homicide was committed in a cold and calculated manner. That is a carefully pre-arranged plan to commit premeditated murder. And let's talk about what the evidence is before the Court in that regard.

The defendant was well aware of his ex-wife's habit of running in the evening. He also had been

to coffee with her, a little earlier in the week, and this was after they had both gone to the airport to see their daughter, Katherine, off, so he knew she was going to be home alone that evening. They had been exchanging text messages and, in fact, Carol Kennedy had sent a message to the defendant stating that he could come out that evening and pick up Katie's car. The defendant had told Charlott and Charlott's boyfriend, Jacob, that he was going riding on his bike on the Hassayampa Trail.

How did this homicide occur? Well, the evidence before the Court indicates that the defendant entered the home from the ranch land directly behind the home. He had stashed his bicycle in the brush, and once in the house, the evidence indicates, that he laid in wait for Carol to return from her run. It also indicates, the evidence, that he was aware there was a golf club at the residence. And finally, there is a staging of the scene, after the homicide was committed, to mislead the police.

And let's not forget Detective Steve Page's testimony. Evidence in the defendant's computer indicated that he was planning for some months on how to make a homicide look like a suicide, going so far in that regard as to get an employer identification number in order to purchase carbon monoxide. This is uncontroverted evidence in this case that the defendant had been planning on killing someone

for months and then ultimately killed his ex-wife.

The F-12 aggravator, witness elimination, so to speak. There is evidence before the Court that the defendant submitted false financial information to the Court in the divorce proceedings and also submitted false information to the IRS in his 2007 tax return.

There's evidence before the Court -- we have heard it from Mr. Echols and we have heard it also from the defense certified public accountant -- concerning the dispute over the so-called Book of Business. Even the defendant's attorney, Anna Young, testified before this Court in a Simpson hearing that there was this ongoing dispute, all the way up to the last day of the divorce, about the Book of Business.

And let's not forget that we have evidence before the Court that if Carol Kennedy had filed her income tax return in the manner in which she said she was going to file it, the defendant's own tax return would have automatically been subjected to scrutiny by the IRS as a result of the deviation between what he claimed was alimony and what she claimed was alimony received.

And Carol, through the testimony of Cynthia Wallace, we had heard, had threatened to report the defendant to the IRS for filing a fraudulent income tax return. Had the defendant been found to file such a

fraudulent income tax return, he was at risk to lose his livelihood as a stockbroker.

Let's go to the F-5 aggravator, pecuniary gain. Specifically, the State must prove that pecuniary gain was a motive, cause or impetus for the murder and not merely the result. And the proof can come in the form, of course, of tangible evidence or circumstantial evidence..

It is uncontroverted, both from the defense expert and the State's expert, that the defendant's income dropped dramatically in the year 2008 in the first six months. Nearly 30-percent. It is also uncontroverted that his expenditures had not. In 2007, he ran a net cash shortage of a 160- to $170,000. In 2008, in the first six months, he had a net cash shortage of over $100,000. He was desperate to file his 2007 income tax return just to get possession of the refund of $70,000 to help cover that shortfall. And even at that, he would be, according to the defense expert, running a $35,000 shortfall. He was in such dire financial straits that he had borrowed $50,000 from his family just to make ends meet. Those facts are uncontroverted.

There is also the threat that Carol Kennedy was going to walk away from the Bridle Path property and allow it to go into foreclosure, further forcing the defendant into more extreme financial circumstances. The

defendant was looking at the possibility of a short sale or a foreclosure, another threat to his livelihood.

And then as recently as July 1st of 2008, the most acute dispute, so to speak, between Carol Kennedy and the defendant, over money, he had demanded from her over $8500 and told her that without those funds he could not pay her the $6,000 in alimony that she had been awarded in the divorce on a monthly basis for eight years. And Carol had told him she wasn't going to give him anything from the 401-K of approximately 180-some-thousand dollars and, in fact, informed the defendant that he still owed her, in addition to the $6,000 dollars in monthly support, $2,491 as a past due amount on the credit card -- the Chase credit card.

By killing Carol Kennedy, the defendant escaped paying Carol nearly $8500 he owed her at the time; he escaped paying her an additional 6,000 times eight years, 500-some-odd-thousand dollars in spousal support payments; and by killing Carol Kennedy, he would have had access to $750,000 in life insurance policies. Pecuniary gain was a huge motive for this homicide.

The F-6 aggravator, was this a cruel and depraved killing. Under A.R.S. Section 13-703(F)(6), a first degree murder is aggravated when the defendant committed the offense in an especially heinous, cruel, or depraved manner. It is written in the disjunctive -- meaning, of course, that

only one of the three is needed to trigger application of the aggravating circumstances. The State has indicated clearly to the Court and the defense that we have elected the cruelty aggravator and the depravity aggravator.

Cruelty goes to the mental and physical anguish suffered by the victim. Mental anguish occurs when the victim experiences significant uncertainty about her fate. In order to constitute cruelty, conduct must occur before death and while the victim is conscious. Conduct occurring after death or while the victim is unconscious does not constitute cruelty. However, conduct occurring after death does constitute depravity.

In this particular case -- oh, and I refer the Court to the Gretzler case where the Court stated only where there is no evidence that the victim suffered physical or mental pain or the evidence is inconclusive have Arizona courts held that cruelty was not shown.

Let's look at Dr. Keen's testimony about this. He describes victim Carol Kennedy's injuries as multiple blunt-force injuries. Death was caused independently or in an aggregate by any of the seven depressed fractures to her skull. She was beaten so severely that her head was distorted, her skull was mutilated, and her face was distorted and mutilated.

Dr. Keen testified that Carol would have

seen her attacker, based upon the defensive nature of the wounds to her right arm -- that is those rod-like blows with a depression in the upper biceps-triceps area. He described those injuries as consistent with being stricken or struck by a golf club. Those injuries also indicated, since they were defensive in nature, that Carol was conscious at the time she was receiving those blows, and Dr. Keen testified that she was suffering as a result of receiving those blows. Not only was she suffering physically from the blows and severity of them, she was also suffering mental anguish as a result of being attacked -- and in this case, attacked by her former husband.

He further testified that it is highly unlikely that the arm of an unconscious person would remain flexed in the manner in which Carol's was discovered when her body was found.

Dr. Keen believed that Carol had been struck in face at least twice and that these blows were not fatal and were delivered before Carol's death.

Her nose had been broken. Both of her eyes were blackened. She had been struck in the mouth. She had abrasions to her lower right chin. There were complex fractures to the facial bones, and the fracture to the nose caused some of the facial bones to become dislodged from the base of the front of the skull.

There was also a severe laceration to Carol's forehead above her left eye. Dr. Keen stated that that laceration could have been caused by forceful contact with the corner of the desk.

Dr. Keen testified that Carol was conscious and alert for at least three of the blows to her head and face. He also testified that any reasonable person would have known that the blows caused significant pain and suffering.

Dr. Keen also testified that it was his belief that she had been struck at least ten times and she had eight distinct injuries to both the sides, the top, and the back of her skull.

She had received comminuted fractures to her skull; that is, fractures that are shattered in appearance, so to speak, comparing a comminuted fracture to the effect of a boiled egg when it is dropped. Seven were depressed fractures, meaning the bone invaded the brain tissue. At least two of the fractures had a curved nature, and the Court has before it evidence in the form of photographs which was consistent with the head of a golf club.

Dr. Keen testified that it was his belief that Carol Kennedy was beaten from all sides. He also stated that because of the lacerations to the scalp and the

fractures to the skull, that they were so severe, it was his belief that the blows causing them had to be both violent and vicious.

He further testified that these blows were so severe that, unlike most autopsies, he did not even have to use a saw to open the cranial vault and, in fact, he had to insert a Styrofoam head while he analyzed the fractures to keep the pieces of bone in place.

Massive and severe blows from all sides were described by Dr. Keen. Depravity. Depravity can be found as a result of the infliction of gratuitous violence upon the victim.

In the case of State versus Ceja, the Court stated: "We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a depraved nature so as to set it apart from the, quote, 'usual or the norm.'"

"Gratuitous violence," quote, "may be demonstrated by the continued infliction of violence after the defendant knew or should have known that a fatal action had occurred." State versus Barra.

And in remarkably similar circumstances in the case of State versus Hyde, a defendant beat his victim

on the head with a bowie knife until the bone was visible and the victim was bleeding profusely. The Arizona Supreme Court held that the defendant's repetitive bludgeoning was an act of gratuitous violence. The bludgeoning continued after both victims were dead with their skulls shattered from the force of the repeated blows. In both cases the blows were delivered with sufficient force not only to shatter the bone, but to cut and tear the brain tissue by forcing the bone fragments into it. Those are the injuries described in Hyde. They are remarkably similar to the injuries suffered by Carol Kennedy.

Dr. Keen testified that any of the blows which caused the bone to be depressed into the brain could have caused unconsciousness and death, and that one was probably delivered relatively early in the attack. Carol's scalp was visibly laid open, such that the bones of the skull were exposed in many of the photos taken at the scene.

Dr. Keen further testified he could not even determine the order in which the blows were delivered, simply that they came from all sides.

He also testified that because of any of the depressed fractures, that the victim would have lost consciousness, and yet she continued to be beaten after she had lost consciousness, because some of those injuries were superimposed upon fractures where the bone penetrated the

brain, which would have resulted in her losing consciousness.

There was evidence found at the scene that this killing was staged to make it appear as though the victim had died as a result of a fall. A ladder was placed in front of the door inches from where her body was found. A large pool of blood was found underneath her stomach, indicating that her body had been moved, because there were no injuries to her stomach. And there is reason to believe that Carol's head had first hit the floor at that location. There was also a severe laceration on her forehead, which was consistent with a blow from a sharp surface, such as the corner of the desk, and in fact, a piece of the desk was found in close proximity to her body, and the corner of the desk was covered in her blood.

And lastly, the F-2 aggravator, conviction of a serious crime. Probable cause has already been found in this case by the grand jury that the defendant committed a serious crime prior to and in conjunction with the homicide of Carol Kennedy; that is, the crime of armed burglary.

Your Honor, this was a savage, vicious killing. We'd ask that the Court find that the State has met the probable cause standard, that each of these aggravators are supported by sufficient evidence. Thank you.

THE COURT: Thank you.

MR. SEARS: May I have a second, Your Honor? I need to move this podium over there and that stuff over here.

As I came into court today, I learned from Mr. King about Gary Kidd, an old friend of mine who is in the hospital, having suffered a heart attack -- a friend of Mr. Butner, as well. And it reminded me pretty dramatically of the fragility of human life and the sacredness of human life, as I sit here wondering how Gary is and what will happen here.

And I also think about the terribleness of the case. And to make it as clear as I possibly can, Your Honor -- for you and for everyone present -- the death of Carol Kennedy was a horrible event. The way in which she died, the injuries that she sustained, the circumstances are awful to think about. And I am sorry that her daughter, who is here today -- I probably should have been more observant and thoughtful and ask that she not be here for this discussion, which we have to have. And I certainly don't fault Mr. Butner for the detail in which he went, because I am going to have to go into much the same detail.

But it points out the awfulness of this event, not only in terms of what happened to Carol Kennedy, but also the awful position that Steve DeMocker is in of having now to talk about these matters in a certain sense, as

if it was somehow conceded that he did these things.

And to be clear, again, Mr. Democker's position, and our position throughout this case from the first moment, has been that he is absolutely not responsible, he was not there, he does not know who did this. He would, more than anything else in the world, want to know who did this, but he knows that it wasn't him. And so the difficulty remains for us to have to work through these aggravators in this context, but we will do so.

Another thought that I had over the last day is just about this case in general. The Court knows that I personally have a long history of doing death penalty work in state and federal court. My colleagues, Ms. Chapman and Mr. Hammond, have extensive experience in state and federal court throughout the country. And we have talked to many of our colleagues about this case and communicated with them through e-mails and telephone calls. And our colleagues have similar experience and background in capital cases. And no one has been able to convince us that what we believe from the first instance is wrong.

We have believed from the beginning in our client's innocence, but we have also believed that this never was a capital case. It is not now and never should be a capital case. And we see that we have come to the moment in this case where for the first time there is an opportunity

for this Court to speak out on this question. The idea, to us, of this case proceeding any further as a capital case is something we just can't imagine.

And I want to take some time this afternoon, if I could, to go carefully through the law and the evidence that has been developed in this case and speak to each of these aggravators, keeping in mind this view that we have that we hope the Court will come to share that this is not a capital case, that this is not a murder, regardless of who committed it, that rises above the norm, that represents the worst of the worst, that is aggravated to the point where death should be a considered option for the jury in deciding how the person who did this should be punished.

Let me start in much the same way as Mr. Butner did, by looking at the F-13 aggravator, if I could. The F-13 aggravator is new to the law, it is the cold calculated aggravator that we talked about considerably in prior meetings with the Court.

I think it is significant to note that in their bench memorandum submitted last week, the State can only cite to you a Florida case to try to explain what this is, and that is because there is a complete absence of any Arizona authority.

The Court has expressed informally some concerns, which are concerns that we have, that this

aggravator may have significant legal and constitutional defects. That in reality, even if you fold into it the brief description from the Florida case, it really is another way to describe premeditation.

The concept of premeditation, we all know, involves planning and thoughtfulness. The opposite, I would suppose, is a heat of passion, provocation, or sudden quarrel killing, where there is no premeditation. But to say that a premeditated murder can be aggravated by another kind of premeditation, whether it is cold or calculating or without pretense or moral justification, is a legal concept, we think, that is highly dubious. And the fact that Arizona Supreme Court has not yet spoken on this, so that it remains the law, is simply a fact. And we will talk about another aggravator that is in the same posture, the F-2 aggravator.

But the F-13 aggravator, as applied to the facts in this case, is really difficult to understand. The State, at various times, including in its memorandum and including today, has argued that this was a violent, rage attack by Mr. DeMocker. And in fact, in the last few days of the Chronis hearing, it seemed to us that they were moving more in the direction of describing this as a confrontation, which is what Mr. Echols -- as, apparently, their motive expert -- said was brewing on July 2nd, that resulted in all the pressures that Mr. Butner has told you about again today,

building up inside Mr. DeMocker, so that he exploded and attacked and killed his wife of some 25 years in a way that the State has described.

How that fits, then, with the idea that somehow it is also a cold and calculated murder is difficult to understand -- unless the State is somehow suggesting that part of the planning and premeditation was to plan a careful crime that was designed to look like something else -- a suicide or an accident or something else -- and then commit it as a rage crime, to somehow confuse everybody, a concept which just makes no sense to us, Your Honor. Either it is a rage crime or it is a premeditated crime. It doesn't seem possible to us that the State is seriously arguing that this was a premeditated rage offense.

That being the case, I think it is pretty clear that the State has not met its burden on this offense, because it is a burden that would be impossible to meet. In addition, it is a burden attached to an aggravator which, in and of itself, may not pass constitutional muster, if and when the Arizona Supreme Court looks at this.

I have informally canvassed my colleagues who do death penalties cases in state courts around the state, and I could not find a single one that could tell me that they had been involved in a case in which the F-13 aggravator actually had been presented to a jury, much less a

jury that convicted the defendant of that aggravator that would result in a Supreme Court ruling on that point. And that may be some recognition on the part of other prosecutors in other jurisdictions that this is -- even though it is on the books as a problematic concept at best.

In their bench memorandum, the State said nothing about Detective Page and the computer searches. And we were wondering, until just now, whether the State had abandoned that argument, that the computer searches somehow were evidence of anything in this case, until Mr. Butner brought them back into focus again in his remarks just a moment ago.

With respect to the computer searches, I think the Court has now had the benefit of hearing from Detective Page in two different hearings, many months apart, and his testimony has essentially not moved in that period of time. He testified that he was doing additional work but that what he had found in the things that he had focused on now nearly a year ago were still in place.

In fact, the Court might recall that in this hearing the State marked and had admitted an exhibit from Detective Page, which was the same exhibit, the same list of computer searches that he brought forth the last time, which included a couple of computer searches that I thought had been thoroughly discredited at the Simpson

hearing, the computer search about "How to kill somebody" that turned out to be a joke page, and the computer search about what turned out to be a DeMocker family joke that "Even the smallest things can attack." I think that would be some evidence of the fact that the State has really not moved the ball forward on that point.

And the Court will remember now, of course, that we now have heard several times from Detective Page that these searches were found in a file called "Book Research." The Court will remember the Simpson testimony about the fact that Mr. DeMocker was doing a number of things connected to research in that area.

And the State has made much, again, of Mr. DeMocker getting an employee identification number, they say, in an attempt to buy poison gas. And we pointed out, again, for the second time a couple of things: One is that the employee identification number information was found near a folder on his computer called "Personal Assistant," and that there is no proof that Mr. DeMocker actually ever sent the form in. It was just something that he was working on the computer. There is certainly no proof that he ever purchased poison gas. And maybe most significantly, this case has nothing to do with poison gas.

So what Mr. DeMocker was doing in his spare time is a far cry from what the State said here today,

which I think is a remarkable leap forward, Your Honor. The State said today that Mr. DeMocker had been planning to kill someone for months. That is just an astonishing leap from what the evidence is, as the Court knows, to a conclusion that Mr. DeMocker had been planning to kill someone for months. It's not supported by any of the evidence.

Mr. DeMocker had been poking around in Websites and storing the information in a folder called "Book Research." So if Mr. DeMocker was the master criminal that the State would have you believe, he is a master criminal who does all of his planning and then saves it on his computer hard drive. It is hard to imagine that that is really so.

But it is much more difficult to imagine that that constitutes evidence that Mr. DeMocker was planning to kill someone -- particularly, when you match up the way that Carol Kennedy died with the kinds of things that Mr. DeMocker was looking at, which were high-tech undetectable poison gases and things like that. And that connection did not seem to impress the Court in the Simpson hearing, and I would hope that it is similarly unimpressive to the Court in connection with whether this remains as a death penalty case or not.

I think the F-13 aggravator was never sustained by the State. I think the State, as you will hear from me later on this afternoon, shifts positions, sometimes

in the same document, to make the same facts appear to support seemingly contradictory arguments.

In sequence, then, we can look at the F-12 aggravator, Your Honor, which is the witness elimination aggravator. Today, the State has blurred, again, the distinction between F-5, pecuniary gain and witness elimination, in Mr. Butner's own remarks. They are, in the State's mind, somehow related.

But if you read the plain language of F-12, it requires proof by the State of a number of things: That the defendant committed the murder, the offense, to prevent a person's cooperation with an official law enforcement investigation; to prevent a person's testimony in a court proceeding in retaliation for a person's cooperation with an official investigation or in retaliation for a person's testimony.

Those are the things that the State would have to prove. And instead, what the State has offered is this. And I will tell you that in the middle of writing down -- this is how I know they merged this -- I was writing down what Mr. Butner was saying about F-12, and then right in the middle of it I write "F-5," because he starts talking about F-5, and then jumps back again to F-12, in my own notes. So I tried to memorialize what I thought was the blurring of these two aggravators.

But it comes down to this, Judge. The State says that Mr. DeMocker killed Carol Kennedy because he was afraid that she would either take him back to divorce court and/or report him to the Internal Revenue Service and/or report him to some unnamed and unspecified agency for the following conduct: Filing false evidence in his domestic relations case. And we have heard a considerable amount of evidence, now, and we heard a fair amount of evidence in the Simpson hearing on this point.

As we pointed out in our motion, Your Honor, at the end of the Simpson evidence, you found affirmatively that there was no financial motivation proved by the State at that time. We recognize that that was a hearing in which the applicable burden of proof was a higher one, was proof evident, presumption great. We realize, as Mr. Butner reminded us, that this is a probable cause evidence.

We took you to mean that there was no proof of financial motivation, so that regardless of the standard to be applied and regardless of the burden of proof at issue in this case, no evidence means no evidence. So the question to us, then, is what has the State provided beyond what they offered in the Simpson hearing which would cause this Court to change its mind?

There has been a considerable additional

amount of evidence, since the Simpson hearing. We have heard from an expert, now, on behalf of the State from Mr. Echols. And it comes down, I think, to this: It comes down to the Book of Business and the accounting issues relative to that, and the issue of the alimony deduction in the 2007 tax return.

I am confident, Your Honor, that you have grasped all of the issues in this case, and I will not belabor you with our recitation of the facts, except in this way. With regard to the Book of Business, Mr. Curry, who was here yesterday, said very clearly that this is two things -- a dispute about accounting practices. Mr. Echols went on in great length saying that it was fraud not to include a dollar amount for the Book of Business on a balance sheet submitted in a divorce case, and that Mr. DeMocker did that, and it was fraudulent, and he knew it was, and he knew that at some point he was going to be called to task for this, and as a result, he killed Carol to prevent her from doing that.

Well, first of all, Mr. Curry said, I thought in quite a clear manner over and over again and on cross-examination over and over again and again, that in his opinion under generally accepted accounting principles -- GAAP -- that the proper treatment for what he described as client relationships was to treat those on an income statement and not to put them on a balance sheet, because

they were not an asset that accounting practices deemed appropriate for submission in any context as a hard or fixed asset. And he gave the Court good reasons for doing that.

He provided you with specific examples, and he said that it was also appropriate, both generally and with respect to Mr. DeMocker, to book on your balance sheet the liability, even though there was no corresponding asset. And that really, I think, fixes the argument between Mr. Echols and Mr. Curry as clearly as it could.

But Mr. Echols could not be made to change his opinion that the asset, even though he had to agree that the money from this employee forgivable loan had long been spent and wasn't sitting in some bank account and wasn't in an asset that was still owned by this family, he still thought that, in his mind, somehow some number had to be put on the balance sheet to balance the liability.

Mr. Curry gave the Court an incredibly simple example about going to the bank and borrowing money, spending the money, and then filing a financial statement. He said if the money is gone, you still owe the bank the hundred thousand dollars, that's a liability, but you don't have the asset. But if you have earnings or other income that are generated from that money, perhaps that is where the value of that asset goes.

It is a different concept. It is a

different concept that seems to us to make complete sense. It seems to us that the reasonable way to look at what Mr. DeMocker was doing was that he knew the money was gone, he knew that he couldn't list it, he knew that he still owed the money year against year, he knew that as the money came to him, he was going to pay tax on it, but the tax that he was going to pay was going to be deferred over time, at a fixed rate per year, and that is what his balance sheet clearly shows.

Interestingly, if you look at that exhibit, Your Honor -- it's 121 -- if you look at Question No. 8, which is the last question there, it asks Mr. DeMocker, who is filling out this affidavit, to submit a list of his expenses, which he does.

The difference that I saw between that exhibit and Exhibit 122, which was the earlier affidavit, is that in 121, the amended affidavit, Mr. DeMocker actually overdisclosed. He attached another sheet of paper that really wasn't even responsive to a question that the affidavit asked him, which was this balance sheet. So now Mr. Echols would have Mr. DeMocker acting fraudulently by volunteering information that he was not obligated by the plain language of that affidavit to provide.

But the other part of this is pretty clear from both Mr. Echols and Mr. Curry. They both agreed,

in general terms, that fraud, at least in this context, implicates some concealment, some attempt to deceive or hide or misrepresent.

Mr. Curry said that it was, to his mind, pretty clear that Mr. DeMocker was always open, that there wasn't any fact about Mr. Democker's employment or what Mr. Casalena thought was a Book of Business, what Mr. Echols thought was a Book of Business, that was ever kept from Carol Kennedy or her financial advisor or her attorney. Mr. DeMocker turned over documents. Mr. DeMocker turned over everything that they need.

The State might suggest, in rebuttal here this afternoon, that Mr. DeMocker didn't turn over this retiring agent's agreement. The evidence -- and the only evidence in this case is it was never signed by Mr. DeMocker and it never went into effect. So to downgrade Mr. Democker's disclosure in this case by saying he failed to disclose something that didn't apply to him is a bit confusing to us.

With respect to the things that did apply to him, the terms and conditions of his employment with UBS, there is nothing missing. And one of the ways you can measure that, Your Honor, is to look at the divorce file -- to look at the divorce file to see if there is a single motion in there filed by Carol Kennedy's attorney asking for

additional discovery or to compel discovery. And I submit to you that you will not find such a motion. To look at the record before you -- to look at e-mails or correspondence, to see if there's anyplace where Mr. Fruge complained that Mr. DeMocker still owed them information regarding the terms and conditions of employment with UBS.

And the answer is there won't be any, because it didn't happen in this case. Mr. DeMocker was completely transparent on all matters financial. And one of the ways that you can measure that is by looking at the settlement of the parties.

The case was set for trial on May 28, 2008, but it never went to trial. Instead, the parties met in the courthouse and hammered out an agreement. Interestingly, the agreement was brought to court by Anna Young, Mr. DeMocker's attorney, and then was full of handwritten interlineations and additions, which in my limited experience in that world is sometimes the way things happen. You are here in the courthouse, and if you can get a deal done, you want to get it done, even if it means handwriting on a typewritten document, which is what happened in this case. Everybody signed it. The lawyers signed it. They presented it to the judge, and the judge approved it, and that became their agreement in this case.

What does that agreement say about the

Book of Business? It awards it to Mr. DeMocker. It is absolutely true, as Mr. Butner says, that this was a subject of discussion and debate between the parties. Anna Young said that. The record says that. That is absolutely correct.

But it was open debate. It was a debate inside a divorce case, and the debate resulted in a settlement, and the settlement was giving it to Mr. DeMocker, which I think can you reasonably believe was a recognition by Carol Kennedy that it really had no value in this case. If it had value, she could have pursued it.

You have in evidence an e-mail, I believe from Mr. Casalena, in which he tells Carol Kennedy that it's maybe a 50/50 chance, if she went to trial, that the judge would award her any amount for the Book of Business. But going back to what Mr. Curry said yesterday, she really did get something for Mr. DeMocker's good will and client relationships, and that was reflected in an alimony stream out over eight years from his future income.

The Court, I remember -- and I'm sure the Court remembers painfully -- had a domestic relations calendar at one time. And in domestic relations law, I think it is understood that a spouse's future income is their sole and separate property, but there are a number of ways -- alimony being one of them -- where the Court can engage in

some income shifting and transfer future earnings -- the sole and separate property of the earning spouse to the non-earning spouse -- to compensate them in part for the good will of that earning spouse's profession, and that is what happened in this case.

You can look at the financial statements, Your Honor, all day and not find another pot of money sitting around, where even if the Court had awarded Carol Kennedy some dollar amount for Mr. Democker's Book of Business, where that could have been satisfied. There is not extra cash lying around. All of the cash available to the parties, such as it was, was divided and used, because they knew what they had. They knew better than the Court what they had and what they didn't have.

On the other hand, Carol Kennedy was going to get an income stream over time. That is the financial benefit to her, and that is the accommodation made to her in consideration of the fact that Mr. DeMocker was going to continue, presumably, in his career. To look for a second, if we could, Your Honor, I think that is what I would like to say about F-12.

The other part of this, I guess, and one passing comment would be, did the record -- does the record show any clear evidence of a threat that Steve DeMocker should have been cognizant of it, and it would have been so

serious to him that he would have considered killing Carol Kennedy?

In an earlier pleading, the State suggested that there was some note from Carol Kennedy dated March 1st, 2008. We searched the disclosure and our own records and couldn't find any note, but we found some e-mails. The e-mails actually started before March 1, 2008, and went on past that. And we collected those e-mails for Your Honor in Exhibit 138.

Exhibit 138, as a whole, we think is a stream of communications beginning in February and going up to just shortly before Carol Kennedy's death, in which the subject of the income tax return was talked about, and that was the basis for our search. But it's around that income tax return that any question of whether there was a threat made by Carol Kennedy to Mr. DeMocker arises.

You will not find any threat anyplace in the record, particularly after May 28, after the date of the divorce, about the Book of Business. That was never threatened. There is absolutely no reason to think on any basis that Mr. DeMocker had some sort of inherent fear that the Book of Business issue would come back to be a problem for him. It had been resolved. It was fully litigated, and it had been resolved in a settlement that was approved by a judge. I can't think of a clearer circumstance where

Mr. DeMocker could have reasonably felt he was in the clear, if he thought he needed to be in the clear on that, and I think the evidence is that Mr. DeMocker believed firmly, for good reason, that the Book of Business had no value, and he knew that. And so to suggest that that was some motivating force for this murder has no support anywhere in the record in this case from any of the evidence, even the evidence that is not in the record in this case.

With regard to the 2007 tax return, the Court's heard, now, in two different proceedings plenty of evidence about that tax return. And again, it comes down to a debate -- not even an argument, but simply a debate about a position on income tax returns where Mr. DeMocker being advised by his tax professional takes a position that he is entitled to spousal maintenance, and to take that deduction for tax year 2007, in a particular amount. Carol Kennedy initially says, "You can't claim any of it," and then Carol Kennedy goes in a different direction and says, "Well, you can't claim as much as you are claiming."

If you look at those e-mail exchanges that we provided in Exhibit 138, you will see that there was negotiation between Ms. Kennedy and Doug Raider and Mr. DeMocker over that, and that, in fact, Mr. DeMocker and his accountant agreed to make some changes and reductions based on the information from Carol Kennedy. They weren't

large, but they agree with her points.

What Carol Kennedy did not like about this was the fact that she was going to have to pay income tax on this amount, and she complained to a lot of people, including Mr. DeMocker.

The record is clear that Mr. DeMocker offered her an opportunity to do something different -- to file a joint return with him. He offered that at least three different times. He told her that in exchange for agreeing to do that, he wanted her to make up the shortfall in his refund, but that that would actually be a good thing for her, because it would save her several thousand dollars, as compared to the tax that she would owe if they each filed separately and she claimed the amount he was claiming as a deduction.

And she declined to do that, and I think that is indicative of the back and forth between these people for months and really for years going back before the time of the divorce. They would squabble over all kinds of things. They were very verbose people and they were prone to writing things down and sending e-mails. And we have given you a few. There are tens and tens and tens of thousands of e-mails out there that the Court has not seen and perhaps never will see in this case. But these e-mails that we have provided for you I think are a fair summary of the back and

forth between these two people about this issue.

But at the end, Carol Kennedy sends an e-mail to Mr. DeMocker in which she talks about a windfall, the windfall being the excess amount in the 401-K that neither one of them expected to be there, and says "I am going to use that windfall to pay the taxes." Now, she may have complained even as late as the end of June to Cynthia Wallace, again, that she didn't have that, but we're really not here to talk about what she told Cynthia Wallace.

The point, I think, of this is whether or not Mr. DeMocker had a reason to believe that somehow something was going to happen to him that he could not withstand that was going to be career threatening. The State has made, without any proof whatsoever, again today, the allegation that this sequence of events has to happen:

That Steve DeMocker files his 2007 tax return and claims alimony as a deduction.

That Carol Kennedy files a competing return that doesn't claim the same amount.

Step 2, that the IRS conducts an investigation.

Step 3, that as a result of that investigation, Mr. DeMocker is found to be wrong.

And that Mr. DeMocker is ordered to pay tax, interest, and penalty, Step 4.

Step 5 is that Mr. DeMocker refuses to pay the penalties.

Mr. Curry said, "Where do you go from there? You go to tax court." He goes to tax court and he refuses to pay, then -- then -- would either the tax court or the IRS take some further action that might, Step 7, jeopardize Mr. DeMocker's professional license.

Of course, at any point along the way, Mr. DeMocker can step in, end that problem, if it arose, by simply paying the disputed amount or cutting a deal with the IRS to pay some settled agreed-upon amount.

So to get where the State wants you to get from this evidence, the tax returns, you have to go tumbling down through these seven steps -- and Mr. DeMocker at every step of the way has to be getting increasingly more stubborn and more pig-headed, to the point where then he eventually allows this matter to somehow jeopardize his license.

But the State has also not offered any point. They have not given you one regulation or presented one witness that could actually tell you what would happen to Mr. DeMocker's professional status. They just want you to understand that that could happen.

To say that that constitutes the kind of an actionable threat that would be substantial evidence, more

probably true than not, that a threat was made to Mr. DeMocker that he could not withstand and that in a rage he killed Carol Kennedy to stop, just stretches the imagination.

If you look at Exhibit 138, there is an incredible interchange in those e-mails, Your Honor, in which Mr. DeMocker actually raises, first, the question, and says to Carol, essentially, "I don't appreciate being threatened."

And Carol says, "I didn't threaten you."

And Steve says, "Well, you sent me a text message that said I wouldn't want to be you if that happened."

And Carol said, "Well, I didn't really mean that. I don't have anything to threaten you with, and you have done wonderful things for your clients and you've been good for this family."

That exchange is in Exhibit 138, Your Honor. That is an exchange between the people affected. We can talk, Mr. Butner and I, around the edges of this and speculate, and bring Mr. Echols in and speculate about what that means. That is the communications between the parties. That is what was in Mr. DeMocker's mind during this period of time.

Carol Kennedy first denying any threat, and then saying, "Well, to the extent that you think it's a

threat, I didn't really mean it.".

Now, she does say, "If you do anything funky" -- that was her word, "funky" -- you know, "then I reserve the right to do something." Hardly the kind of threat that a person of Mr. DeMocker's position, having gone through years of this -- not just the 14 months of the divorce, but years before that -- disputes about money, disputes about finances, and knowing Carol better than anybody else -- hardly substantial evidence of the kind of an actionable threat that this Court could find constitutes probable cause that Mr. DeMocker, on July 2nd, 2008, killed Carol Kennedy to stop this. There is no specificity. It never happened.

Cynthia Wallace, the last person, presumably, to speak to Carol Kennedy about the subject told her, don't do that. Just file a return. The IRS will sort it out. You don't have to do that. Carol Kennedy was upset about that, but there's not any evidence that Carol Kennedy carried that anger to Mr. DeMocker. And in fact, you won't see any further communications after the Cynthia Wallace meeting with Mr. DeMocker about the tax return. Instead, they shift into what Mr. Butner called -- let me see if I can get his words here -- "the most acute dispute between the parties."

The most acute dispute, Mr. Butner suggests,

is this final back and forth about the, what we call, the overage on the 401-K. I know the Court understands the factual predicate for that. But this is what the State would have you believe, Your Honor. That this is an aggravated death penalty case, because towards the end of her life, Carol Kennedy and Mr. DeMocker, after they were divorced, had this remaining matter.

What does it consist of? It consists of a dispute between Mr. DeMocker and Miss Kennedy about what the divorce decree said. The divorce decree says they will split the difference. The divorce decree doesn't say what the difference is or how it is to be calculated or when it's calculated. Just like any other document drafted by lawyers, it is full of holes and ambiguities, and that is the dispute.

Carol Kennedy also has another corollary dispute about the Chase payments. It's really the same sort of dispute. The Chase payment dispute consists of Mr. DeMocker's belief that the decree orders Carol to pay out of the money from the 401-K the then existing balance on the Chase card. Carol says no, there were four payments missing -- I think the number is four -- four payments that weren't made. You should pay those first so I shouldn't have to spend, quote, "my money" paying those, and that is the dispute back and forth.

And so when you net out all those monies,

Mr. DeMocker says, "I owe you 6,000, you owe me 8500, let's get together and exchange checks." That is the last communication between Mr. DeMocker and Miss Kennedy. That's what he says he's going to do. He doesn't say "I can't pay it," he doesn't say "I won't pay it," he doesn't say "I'm coming to hurt you." He just says "Let's get together and exchange checks." That never gets answered.

Before that, Carol Kennedy says, the night before, "Nah, I've got a different set of numbers. Actually, when you do it this way, I don't owe you half of $17,000, I owe you half of $6,000, but you owe me $5,000, so now you owe me $2500 plus the 6, so you actually owe me $8500." That is where they were stuck on that day.

The State would have you think that this is the most acute dispute between the parties. This Court has heard more significant disputes, and this Court didn't sit in the divorce case. If you read the divorce file, if you read Anna Young's file, if you read Mr. DeMocker's deposition, if you read the interviews of Mr. Fruge and Mr. Casalena, you took the testimony of Anna Young, all of us would understand that these parties fought about lots of different things related to money.

But to say that this dispute, simply because it happens at the end of Carol Kennedy's life is the most acute dispute and is the provoking moment, the trip wire

that brings Mr. DeMocker there on July 2nd to kill her, it makes no sense to us, Your Honor. It makes no sense when you look at the evidence. It makes no senses when you think about the history between these two parties, and it really makes no sense when you try to analyze what Mr. DeMocker's state of mind was.

Mr. DeMocker's state of mind was "This is just another problem. I wish we could be through squabbling about this stuff, but if we go back to court, eventually the judge will figure it out." Would there be any basis in fact for Mr. DeMocker to believe that this was going to be some disastrous event that caused Mr. DeMocker to kill her.

Which brings us to the final point, which is Mr. DeMocker's financial situation on that day. You found, Your Honor, in the Simpson hearing, that Mr. DeMocker was actually better off after the divorce. I will grant you that we have heard much more detailed information now about Mr. DeMocker's situation, but I ask you, Your Honor, whether the State has produced any evidence of any consequence that would be sufficient to change that opinion, to say that Mr. DeMocker was worse off.

What they have done, through Mr. Echols, primarily, is try to argue that Mr. Democker's position after the divorce was desperate -- and I listed some of the synonyms -- desperate. That he was broke. That he was

desperately seeking to obtain money. Desperately -- what was the description -- he was in a rush to file his tax return to get the money, because he was down to his last cent.

Look at what Mr. Curry said, looking at the same information that Mr. Echols had. Mr. Curry said that, actually, Mr. DeMocker was better off financially, that Mr. DeMocker had less credit card debt, due in part to paying down some of the debt, and due in part to the fact that some of the 401-K money went down -- went to pay down that UBS card in half that Mr. DeMocker was going to use. Mr. DeMocker had more than enough money in the bank on July 2, 2008, to pay Carol Kennedy.

If he sent an e-mail the night before that said " I can't float you a full payment this month unless you pay me the money," that could simply be taken as a negotiating position. The posturing back and forth, on both sides, from Mr. DeMocker and Miss Kennedy, leaps off the pages of these e-mails, Your Honor. That's just like most people in a divorce arguing about money, both of them are going to use hyperbole and overblown language, trying to present themselves as some sort of victim.

And Miss Kennedy is as guilty of that as Mr. DeMocker is alleged to be by the State. Miss Kennedy complains mightily, for example, that she has no money to pay the taxes. She had $147,000 in her bank account on the day

she died. The taxes on the 401-K distribution had been paid by withholdings when UBS QDRO'd that money over. The taxes that she would owe are the taxes that Mr. Curry talked about and Mr. Echols talked about on the alimony income.

What she didn't like was that paying the taxes would eat into the money that she would walk away with. The purpose of the divorce was to pay off as much of the credit card debt, the join debt, so that she would have a paid off credit card -- the Chase card -- to pay the taxes on the distribution, to give her money to pay her own income liability as a result of the way she was going to file her 2007 return, and leave her some amount of money.

The record also shows that she spent hours, apparently, with yellow pads like this, making pro forma budgets, trying to see who was going get paid, how much to pay her lawyer, how much to pay her expert, how much to pay this bill and that bill, and had different iterations of that that always produced some positive amount -- sometimes it was a little, sometimes it was more.

But the idea of this that Carol Kennedy was going to come out with essentially no debt except for the mortgages on her house and $72,000 a year in alimony for the next eight years plus whatever she chose to supplement that with on her own earnings. This is a lady with graduate degrees and a history of earning in the past. So to suggest

that Carol Kennedy was desperate for money and was pressuring Mr. DeMocker to the point where he built up this rage and exploded, it's not consistent with the evidence.

The evidence is she may have complained that she didn't have enough money. That's not uncommon in divorce. People, in my limited experience, very rarely walk out of divorce court saying "Boy, that was a good experience. I'm glad I did that. That was really swell."

They come out saying "I got shafted. The judge didn't understand, my lawyer dump-trucked me, the other lawyer lied, my husband lied, nobody will help" -- that is in the record. That's in the record in this case.

The reality is that Mr. DeMocker's financial position was better. As Mr. Curry said yesterday, he had a down tick in his earnings in the first half. Historically, his earnings picked up in the third and fourth quarters.

You remember that interchange with Mr. Echols where he seemed confused by that, but he had to concede, eventually, that Mr. DeMocker earned 59-percent of his income in the third and fourth quarters, which is more than he earned in the first and second quarter of that year. And Mr. DeMocker had a $70,000 tax refund. Mr. DeMocker was expecting at least 16- to $20,000 in QDROs that would come to him as a result of the divorce settlement. And Mr. DeMocker

had the expectation that he would be able to essentially spend his way through this.

It is overblown, inconsistent with the evidence, contrary to the facts in this case to suggest that Mr. DeMocker was in a desperate financial situation. One way to measure that, Your Honor, is to try and find something in the record beyond that one sentence in a much longer e-mail that would suggest that Mr. DeMocker was broke and desperate for money.

Mr. DeMocker borrowed money from his family largely because he was paying in 2007 all of the family expenses -- his own expenses, Carol's expenses, the children's expenses, and, don't forget, his own attorney and his own accountant. And the fact that he had a cash flow issue is simply a cash flow issue. Sometimes that is what families can do for each other. But to say that that is an indicia of financial desperation is overblown and certainly in no way connected to the idea that Mr. DeMocker committed an aggravated murder by killing Carol Kennedy under those circumstances.

Talk, if I could, in some detail, Your Honor -- and I appreciate you bearing with me -- about F-6, about the cruel and depraved nature of this. I think the best way, at least for us, to look at this, is to actually look at what the State is asserting, and to look at what

Dr. Keen actually said. We view the testimony of Dr. Keen as being the State's evidence on this point. Argument of counsel are arguments of counsel. But Dr. Keen is the person that had the foundation and the basis for doing this.

The State has said the following four things, now, in this Chronis hearing about F-6. One, they stated Dr. Keen stated -- they believe that Dr. Keen testified that the defensive injuries would have been extremely painful and would have caused mental anguish and suffering, due to the viciousness of the attack. They say that Dr. Keen believed Carol had been struck in the face at least twice, and that these blows were non-lethal and were delivered before Carol's death.

They say that Dr. Keen testified that Carol was conscious and alert for at least three of the blows to her head, face, and arms.

And finally, for the first time ever, they have said that Mr. DeMocker purposely smashed Carol's head into the desk, to somehow support this accidental fall scenario. That is a brand new -- a brand new theory, never before raised and inconsistent with what Dr. Keen testified to, by the way, in this hearing.

This is what Dr. Keen actually said about F-6 and cruelty, Your Honor. On October 28, at Page 19, Line 24, carrying over to Page 20 through Line 15, he says:

Question: "Is death from one of these injuries instantaneous?"

Answer from Dr. Keen: "Not necessarily. I can't tell you which blow with the combination sequence of these blows was such to cause swelling in the drive centers for both respiratory and cardiac functions and then death. I don't have an opinion as to consciousness from the head blows beyond whatever may have happened from the face. Because I don't have specificity in the face, and I don't have her chronology of the facial injuries. I don't know when they occurred. Once any of the blows to the head occurred, then there was a loss of consciousness."

Page 20, Line 21 over to Page 21, Line 2. 20, 21, to 21/2, Your Honor, in response to the question about blows to the face, in a response to a question about whether Miss Kennedy was conscious or unconscious, Dr. Keen answered:

"I can't tell with a definitive statement because I don't know precisely when the facial blows occurred."

Page 21, Line 25, through Page 26, Line 1. 21/25 to 26/1. Dr. Keen goes on to say:

"If the facial blows were prior to any of the blows to the cranial vault or the top of the head, then they would be conscious then, but I can't say that they

were."

Page 22, Lines 10 through 12, responding to another question regarding the victim's consciousness during blows to the head, Dr. Keen said:

"Depending on the sequence of when they were delivered, some of them yes, but most of them no."

Page 25, Lines 14 through 15. Dr. Keen testified that the only indication of a struggle is the broken fingernail.

Page 26, Lines 13 through 19. The blows to the arm, however, are consistent with that portion of the body being placed between the assailant and the victim, and were more likely while they were still conscious.

Page 21, Lines 3 through 6. The blows to the arm indicate consciousness.

Page 21, he says, then, the blows to the arm caused suffering in the form of actual physical discomfort and psychological discomfort, on Page 22.

But on cross-examination, here is what Dr. Keen said:

Question: "If the body had been moved, based on drag marks and blood or abrasions on the body, then you would have no way of knowing in the autopsy room whether or not those injuries -- those strike injuries to her right forearm were inflicted first or last."

MR. BUTNER: Do you have the page for that, please?

MR. SEARS: Page 61, Line 24 through Page -- through 62, Line 11. 61/24 through 62/11.

May I go back, Your Honor?

THE COURT: Yes.

MR. SEARS: His answer to that question was not definitively no.

Question: "And clearly if they were inflicted after she lost consciousness, they would be in no way defensive wounds; correct?"

"They wouldn't. You would have to have a very -- as I suggested earlier -- a very special set of circumstances to get the position proper in an unconscious person, because it is not a usual unconscious-person position."

He goes on to say: "Is there anything else about these injuries to the right forearm, other than their location, from a forensic point of view makes them defensive wounds or consistent with defensive wounds?"

Answer at Page 62, Lines 19 through 24: "Consistent with it but does not require them to be."

That's what Dr. Keen said about cruelty. Cruelty, as Mr. Butner correctly points out from Gretzler and other cases, is related to the mental state of the victim, as

opposed to depravity, which focuses on the mental state and the words and actions of the assailant in this case.

I think we can go back and forth on this, but the way we have analyzed it is this, Your Honor. That cruelty and depravity would apply to facts of this case are really in some respects polar opposites. That the concept of cruelty under F-6, in this case, would require substantial evidence, proof that is more likely true than not that Carol Kennedy was conscious during some of the blows and/or that Carol Kennedy had some reason to know what was going to happen and to be fearful. Let's take the last part first.

The State has -- this is an example, I think, of where State shifts its theories to suit the argument that it needs to have them apply to. The State has said that Mr. DeMocker was laying in wait, surprised Carol Kennedy while she was on the phone to her mother, and attacked her. The State has presented evidence that says that Carol Kennedy's mother, Ruth Kennedy, was on the phone and said that Carol said, "Oh, no," and screamed, and the phone went dead.

But they've also presented, in this Chronis hearing in pleadings, evidence that suggested at a later time Ruth Kennedy changed her recollection of that conversation and said essentially that Carol Kennedy just said "Oh, no," that she didn't remember saying that Carol

Kennedy screamed and didn't remember it happening. That the statement "Oh, no," was in sort of an annoyed or indifferent way, but it wasn't fearful or screaming.

So, the State has argued polar and opposite inferences from the same circumstances, what Ruth Kennedy said Carol Kennedy said on the phone.

Is there, then, substantial evidence that just those words alone indicate that Carol Kennedy knew or was aware that she was being attacked? The State's theory seems to suggest that Mr. DeMocker approached from behind and that there was no sound on the phone of a struggle. The question of whether she screamed or not is contradicted by the only person that says they heard that scream -- by Ruth Kennedy. Either she screamed or she didn't scream.

More to the point, Dr. Keen testified, in general, that the first blow to the head, to the top of the head, would have rendered Carol unconscious and that he couldn't testify about the sequence of events. So this is a scenario that is consistent with Dr. Keen's testimony, that whomever did this -- remember, we are saying without question it was not Mr. DeMocker -- but whoever did this, if there was only one assailant, struck her first in the head, and she fell.

And you remember, Dr. Keen said that he thought likely the injury over her left eye was from the

corner of the desk, based on the blood and the shape of that injury, and that the facial injuries that he saw were consistent with falling against the desk. In order to avoid that testimony from Dr. Keen, the State has manufactured, today and in their brief filed on November 12th, a new theory, not advanced by Dr. Keen or anybody else, that it was Mr. DeMocker smashing Carol Kennedy's face that caused those injuries. There is no evidence in the record to support that.

The State continues, through its second prosecutor in this case, to make things up when the evidence doesn't fill in the gap for them. That is a made-up fact, Your Honor. There is no evidence to support that. Dr. Keen had a sequence of events that the State didn't care for, because it had Carol Kennedy unconscious from the first blow, the facial injuries being caused by falling against the desk and a series of blows in rapid succession.

Dr. Keen wouldn't agree with me that it was as fast as I was rapping my hand on this podium, but he said it could have happened very rapidly. He said that -- at Page 56, Lines 13 through 21: "All blows could have been inflicted in a very rapid manner."

He said at Page 56, Lines 9 through 12, he cannot tell the length of time that elapsed between each of the blows. He cannot determine for which blows the victim

was unconscious or at which point she was killed.

Page 34: The first blow could have rendered the victim unconscious, and her death could have occurred in a relatively short period of time.

Page 56, Lines 6 through 10: It would not be necessarily apparent to an assailant that the victim was dead right away, but a rational person would know that she was dying from the severity of the blows.

59, Lines 2 through 7, and if you recall, Dr. Keen also said that it was possible that Miss Kennedy could have made some audible sounds. They wouldn't have been conscious speech, but he described a number of physiological circumstances that could have caused her to moan or make other sounds. He talked about a death rattle, as unpleasant as that is to think about.

The question of depravity, Your Honor, is related in this way, that as we suggest, the evidence is consistent with -- and not inconsistent with -- the scenario that I've described -- one blow to the head rendering her unconscious, hitting her face on the desk, and the additional blows coming down. And then the blows on her arm being inflicted post-mortem.

Dr. Keen had an opinion that the blows to the arm were likely inflicted while she was alive, but he, as I read you in a number of places, conceded properly on

cross-examination that he could not say for certain and that it was possible that those blows to the arm were inflicted after she was unconscious.

If that's the scenario, Your Honor, then she is not -- and Miss Kennedy is right in her later recollection that Carol didn't scream, there is no evidence in the record that she saw her attacker, knew her attacker, was aware of what happened to her. She was struck from behind, she fell against the desk, and the blows in a very rapid order were done by whoever was determined to kill her, including the blows and the strikes to the arm.

Dr. Keen also, interestingly enough, did not reject out of hand the possibility that two different weapons and more than one assailant were possible. The Court remembers all of that testimony from Dr. Keen about two different objects -- one that would cause the linear contusions on the arm and another object, including objects that were not golf clubs, causing the fractures to the top of her head. I continue to remind myself how distasteful it is to even be speaking of these things, Your Honor, but I know that it is my responsibility to do that, and that is just what I am doing here. But that is what the evidence is.

So to say that the State has met its burden, even at the probable cause level of cruelty, requires this Court to disregard Dr. Keen's testimony that I provided

here and to adopt only the State's version. When there are two competing versions, Your Honor -- particularly two competing versions advanced by the same witness, a witness called by the State, we suggest to you that that makes it impossible for the State to say only one of those versions is worthy of belief.

And if there are two equally plausible versions for the same set of circumstances, then it can't be said that the State has met its burden, that it's more probably true that one version is correct and not the other. And this came from their own expert -- these contradictory conclusions about the same set of circumstances.

Looking at depravity. Depravity, at least applied to the facts of this case, is the other side. The theory of that is that she was unconscious, perhaps with the first blow. But the other blows were essentially overkill and that they were gratuitous. Dr. Keen said this:

"The victim was hit at least two times in the right side of the skull" --

MR. BUTNER: Mr. Sears, book and page, please.

MR. SEARS: Next words out of my mouth were book and page.

Page 27, Lines 21 through Page 28, Line 3: "The victim was hit at least two times on the right side of the skull."

I will start with the page. Page 30, Lines 10 through 12: "The victim was hit at least three to four times on the left side of the skull."

Page 30, Lines 13 through 24: "There were comminuted fractures resulting in shattering of bone that indicates the severity of the blows to the skull."

Page 33, Lines 4 through 6: "The victim received blows to the head while unconscious."

Page 33, Lines 7 through 12: "As many as six blows would have been received while the victim was unconscious."

Page 33: "The victim is defenseless from any blows she received while unconscious."

Page 34: Dr. Keen, though, cannot determine for which blows the victim was unconscious or at which point the victim was killed.

As I said before, Page 56, Lines 9 through 12 and 13 through 21 say that Dr. Keen cannot tell the length of time that elapsed between each of the blows. That all blows could have been inflicted in a very rapid manner.

Page 57, Line 6 through 10 says: "The first blow could have rendered the victim unconscious and her death could have occurred in a relatively short period of time."

And finally, Page 59, Lines 2 through 7, again: "It would not be necessarily apparent to an assailant that the victim was dead right away, but a rational person would know that she was dying from the severity of the blow."

This might be a good point for us to remember that F-6 requires not just proof of cruelty or depravity, but especially cruel or depraved. By way of illustration, in State versus Anderson, which we provided to the Court and Mr. Butner earlier this week, 210 Arizona 327. Page 35 of the Westlaw page -- I think it's Page 123 of that volume. They are talking about the facts of the killing in Mr. Anderson's case. This is a Mohave County case. The Court might remember this case. It received a fair amount of publicity.

In this case, they found no evidence of cruelty, and they found that the matter was not especially heinous.

But they get down to gratuitous violence and depravity. The Arizona Supreme court -- this is an opinion from Justice Hurwitz in this case. This is what Justice Hurwitz says: "The issue of gratuitous violence presents a closer question. Both Delahunt and Wear" -- they were the two victims in this case -- "were subjected to prolonged and varied attacks before they succumbed. Delahunt had his throat slashed, a knife pounded into his ear, and his

head beaten with a rock. Wear was shot through the jaw, hit over the head with a rifle butt and a lantern, and then killed by blows to the head from a cinder block."

And by the way, this was an attack that started inside a trailer, and Mr. Wear, not unlike Rasputin, got away somehow, even after all these injuries had been inflicted, and was chased outside and then eventually killed with a cinder block to the head.

Justice Hurwitz says: "While these multiple attacks were reprehensible, they do not meet the F-6 test of gratuitous violence. Each attack came in an attempt, albeit clumsy, to kill the victim, not to engage in violence beyond that necessary to kill."

We've provided Your Honor, in our moving papers in connection with this aggravator, a list of other cases, including the Ceja case that Mr. Butner referred to, in which attacks and murders, which we would submit are even more brutal, if that's possible, than the attack on Carol Kennedy, were found not to be depraved. The reason for that is the depravity, under the jurisprudence in this state and elsewhere, requires some especially depraved state of mind, some factor or factors that lifts the killing in that case above the norm.

Another way to look at it is, can it be said that the force used on Carol Kennedy was so clearly

beyond that necessary to kill that it was depraved? Well, if the killing of Mr. Delahunt and Mr. Wear by Mr. Anderson and his co-defendant was not depraved, I would simply suggest, Your Honor, that no argument could reasonably be made in this case, as sad as it is to think, that this was a depraved killing. Because remember, depravity focuses on the mental state of the assailant in this case.

You look at the other cases on depravity, you look at the factors in Murdaugh, that we talked about -- Murdaugh is, of course, is 209 Arizona 19, an Arizona Supreme Court case. Justice Ryan has used these factors going all the way back to Gretzler and the Sanson {phonetic spelling} case, whether the defendant relished the murder -- this is talking about heinous and depraved and kind of blending them together -- whether the defendant inflicted gratuitous violence on the victim, whether the defendant needlessly mutilated the victim, the senselessness of the crime, the helplessness of the victim.

Dr. Keen said that she was helpless. That, I think, is without question if she was unconscious, but we are not focusing on the state of mind of Carol Kennedy with respect to the depravity prong of F-6. We are talking about the actions of the person that did this horrible thing. And I would suggest to you that the State has not and cannot and will not ever be able to meet its burden on the depraved

prong.

And I think the testimony of Dr. Keen stands for the proposition that the State is not there, even at the probable cause level, on cruelty. It is an either/or situation. But a plausible scenario adopted by Dr. Keen wholesale has Ms. Kennedy being rendered unconscious on the first blow, and he could not say to a degree of medical certainty that that was not this case.

And if that is true, then all the other blows, including the blows to the face and the blows to her right forearm, were inflicted when she was unconscious. If that's the case, then the issue swings to the depraved prong. I would suggest that the evidence, as awful as it is, is that this was simply the force necessary in the mind of the perpetrator to kill her -- using the words of Justice Hurwitz, "albeit, clumsy" -- and that they were inflicted in just a matter of a very short time to a person that was making audible sounds. That is, unfortunately the idea that it's the force necessary to kill. It doesn't make it any less of a murder, Your Honor. The question is whether under the law of Arizona it should be an aggravated murder for which the person that did that terrible thing should be exposed to the death penalty.

Finally, Your Honor, let me talk for a minute about F-2. I think the State would have you believe

that this is an open-and-shut matter. We have looked as far as we can into where this amendment in May of 2003 to F-2 came about and how it came about, and this is what we have discovered on this, Your Honor.

That prior to 2003, the F-2 aggravator did not permit the State and the judge sentencing, because we were pre-Ring at that time, to consider contemporaneous crimes as aggravators. And that made sense. It made sense because the purpose of F-2, as we all came to understand it over time was, to punish violent recidivists with death. That if a person committed a succession of escalating violent crimes that finally resulted in a murder, that very fact is an aggravating circumstance.

The only exception to that would be a contemporaneous homicide. But there is another way to address that, which is the idea that there were multiple victims involved. In a case called State versus Rutledge that went to trial -- and I will give you the citation for that, Your Honor.

While I am flipping through that, Your Honor, let me tell you about State versus Rutledge, Your Honor. In that case the State argued under the predecessor of 703(F)(2) that it still should be allowed to use contemporaneous crimes as prior violent offenses for purposes of seeking the death penalty under this aggravator.

In that case, generally, Rutledge and a co-defendant were in a car, they were in the back seat. Knives came out. The occupants in the vehicles fled. They were chased down. One of them was stabbed to death, and then Rutledge and his co-defendant went back and drove off in the Ford Explorer that they had taken from the guy they had killed and the guy they had driven off.

The State wanted to use some of those related crimes as prior violent offenses, and the Court declined to do that. Mr. Rutledge was still sentenced to death. He was then, in a fortuitous circumstance, given a Ring resentencing, after the Ring decision, and in fact, was sentenced to life in prison.

It is not entirely clear to us, because the legislative history is pretty scant on this, but the Arizona legislature in the Spring of 2003, either in reaction to the trial court decision or the Arizona Supreme Court decision, amended the law to add this idea that a contemporaneous violent offense could still be a part of F-2.

Looking at all of the cases we could find since then, it appears that Arizona is the only state that has -- in the states that have the death penalty in the United States -- that does this. No other state has adopted this. And the Arizona Supreme Court has never spoken about this amendment to F-2.

And if you look at the overall purpose of the Arizona capital sentencing scheme, all the aggravators and the way it works, and the Constitution, the whole purpose of the death penalty is -- the death penalty statutes, is to take the worst of the worst -- the cases that rise above the norm, beyond the pale -- however you want to characterize it -- and separate them out from other murders, and subject the defendant in that case to the ultimate punishment, because they are the worst of the worst.

The purpose of the structured analysis that we go through is to narrow the larger field of homicides down to those few homicides which are deserving, at least according to the people of Arizona and as reflected through their legislators, of the ultimate penalty in this case.

By contrast, if you look at the idea that the State is advancing here, that the -- simply by the way they charged this case, one continuous course of conduct -- Mr. DeMocker going to the house and going inside the house and either being armed when he went in or becoming armed when he got there with the intent of committing a felony inside, and then acting on that, is arbitrarily broken into two separate offenses. And then the further allegation is that that further offense becomes an aggravator to the homicide is simply a fact of the way the case was charged and allows them to do that.

I will give you an extreme example, here, Your Honor. I have a case right now in which the allegation is that my client failed to register as a sex offender, a fact which is relatively easy to prove -- either he did or didn't, and maybe there's a question about whether he knew or didn't know. But the way the case was charged was in five counts. Monday, such and such a date, he didn't register; and then the following Monday he didn't register, Count II; and the following register Monday he didn't do that, and then they allege multiple offenses not occurring on the same day under 13-702.02.

In a certain way, that is what's been done here. If you think about it, every murder on the State's analysis that is committed inside a residence or a business or even where the defendant sticks his arm into a car to shoot somebody, is at the instant before the trigger is pulled or the knife is plunged, an arm burglary of that space.

Burglary is, as we all know, essentially, a status offense. It is simply being present with intent. It is beyond what people in the street would understand is burglary, which is somebody in a black mask going through an open window. It is simply being present with intent.

To say that the legislature could reasonably and constitutionally say that as part of this

narrowing process we're going to make all of those crimes potentially capital crimes, would leave only murders that occurred out in a field -- in an open field -- as cases where the death penalty could not be applied on the F-2 aggravation theory. It sweeps in virtually every murder imaginable that takes place someplace indoors and aggravates them and makes them capital murder.

I suggest to you that when the Arizona Supreme Court, if they ever get the opportunity -- and I am sure they won't in this case -- but in some other case gets the opportunity, they will see this. They can't act in a vacuum. They have to have a case, and they don't, and they haven't, and I think for good reason.

I would be surprised if prosecutors elsewhere in this state would go to the extent that the state has in this case to charge the case in a way that positions Mr. DeMocker to be exposed to the death penalty on this F-2 theory. I saved that for last, because I think it is primarily a question of law, but the facts of this case, I think, are indicative of the problem created by this change in the law.

And we would be happy to try and brief that further, Your Honor, if you wanted more information. We could try to conduct a search and see if there is any help from any other place. But what we do know, from looking at

Rutledge is -- and what has been done since then -- is that we don't think there are any other states that go to this extreme and have this contemporaneous crime concept except for contemporaneous homicides. But that's not what is charged in this case.

So I thank you for hearing me out, Your Honor. I know I have gone on at great length here. We can't think of anything that's more important about this case than whether it proceeds as a death penalty case.

We have great confidence in what will happen when we get to trial that makes us believe firmly that we will never get to these questions. Nevertheless, Your Honor, the way in which this case proceeds, if it proceeds as a capital case, is bound up in these determinations -- the length of the trial, how the jury selection process goes, and frankly, where Mr. DeMocker will be pending trial, seem in some way to be related to whether this proceeds as a capital case.

As I said at the outset, this is a place in this case where for the first time you will have a clear opportunity to say what you are thinking about this. But to go back to what I said at the beginning, we never believed this to be a death penalty case. We've now had the benefit of days and days of testimony that have only served to make us more sure that this is not a death penalty case.

For the record, Your Honor -- and I don't know this is the place to do it, but it is a capital case and we have to do these things -- there is a case called State versus McCaney, which I'm sure the Court knows well, in 2004, a case which we submit was wrongly decided. It was decided before Chronis, of course.

And that is the case that says that a defendant is not entitled to have a probable cause determination by a grand jury. And although we are eternally grateful for not only this opportunity but the way in which this Court has allowed this Chronis hearing to progress and the time the Court has given us for all of this, we still want to make it clear just for the record that we think that McCaney was wrongly decided, particularly in view of Chronis, and that we are not waiving our right to a grand jury determination. It may be a little late to say that now, Your Honor, after six days, but here we are.

I don't know why I can't put my finger on that Rutledge.

THE COURT: It's okay. I don't think you need it.

MR. SEARS: I can find it pretty easily.

THE COURT: I don't think it's necessary.

MR. SEARS: Thank you, Your Honor.

THE COURT: Mr. Butner.

MR. BUTNER: Well, I can't talk that long. In fact, I wonder whatever happened to brevity being the soul of wit.

But in response to the defense argument, I would point out to the Court that I am not standing up here, and I wasn't standing up here earlier, simply making things up.

We have substantial evidence in this case that this was a staged homicide scene. The staged aspect of it being the propping of a ladder over a doorway to make this look like a fall. Well, it is very easy to take the step from that process of propping that ladder up to also taking the victim's head and bashing it against the corner of the desk to make it look like she struck her head while falling from the ladder, and that was ultimately the instrument of her death.

In regard to cruelty. Referring to Dr. Keen's testimony, again. At Page 21, beginning at Line 20 -- and this is me beginning examination or, actually, redirect.

"In regard to the blows to the face, first of all, the blow that broke the nose and the one that is to the upper left forehead, as I recall, first of all, is it your opinion that the person was conscious or unconscious when they received those blows?"

Answer: "I can't tell with a definitive statement because I don't know precisely when the facial blows occurred. The fractures across the back of the skull are such that we have left-to-right fracturing in the parietal area and at least one of these abuts upon preexisting fractures. So we know that there is secondary fractures to preexisting fractures to the back of the head. The first one would be enough to cause loss of consciousness, whenever these occurred. At that point, they become unconscious. If the facial blows were prior to any of the blows to the cranial vault or the top of the head, then they would be conscious then. But I can't say that they were."

Question: "Okay. But you have opined that the blows to the arm occurred while the person was conscious; right?"

Answer: "Yes, sir."

Question: "And those caused injury to the person; is that correct?"

Answer: "Yes, sir."

Question: "And did those, in your opinion, cause suffering to the person?"

Answer: "Suffering on two fronts. Yes, sir."

Question: "Would you explain what you mean, 'suffering on two fronts.'"

Answer: "Well, one is the actual physical discomfort from the blows, and we have actually two episodes. We are going to have two episodes of physical discomfort from the impacts. And the second aspect is the awareness that you are being struck, which is psychological as opposed to physical pain."

Question: "Okay. And after that, were you able to determine the sequence of blows?"

Answer: "Not definitively, other than the blows -- we certainly have blows to the back of the head fairly early on."

Question: "Now, the blows to the arm and upper arm area, are those from the front or from the rear?"

Answer: "They are mostly from the front. They may be somewhat to the side, but it's more front than rear."

Question: "Okay. And so presumably, then, the person was at least seeing their attacker at that point; is that correct?"

Answer: "Yes, sir."

Question: "And then the blows to the head area, were you able to determine kind of the direction of those various blows?"

Answer: "We have blows that are occurring to the exposed right side of the head, and we have

blows that are occurring to the exposed left side of the head. So the position of the victim's head relative to the position of the assailant changes during the course of the sequence of delivering them."

Question: "So, in other words, this person is receiving -- the victim is receiving blows in regard to the arm, first of all, from the person's right side; is that correct? The victim's right side."

Answer: "Right and in front."

Question: "Right and in front?

Answer: "Both."

Question: "Okay. And then in regards to the blows to the head, the person receives blows to the right side of the head?"

Answer: "Yes, sir."

"Ask then do they receive blows to the rear of the head?"

Answer: "It is kind of a progression. There are some that are a little more rear than the right, but unless you are directly on the midline, there really aren't very many directly on the midline or to the right of the midline or to the left of the midline. So I have mostly right and left."

"Okay. So we've got blows to the right side of the head, and then we've got blows to the left side

of the head; is that correct?"

Answer: "Yes, sir. And then we have a blow to the left front."

Question: "And the left front. Okay. And in regard to those blows to the face and the left front, if I understand your earlier testimony, you are not sure whether the victim was struck from the front or they got hit from the rear and their face struck something to cause that; is that correct?"

Answer: "That's correct."

Question: "Would it be fair to state that this beating that this victim sustained went basically around the victim, all the way around?"

"It's fair to say."

Question: "And in your opinion, Doctor, did the victim suffer as a result of this beating?"

Answer: "To what I have already expressed the degree of suffering, yes, sir."

Question: "Are there blows to the head that could have been sustained by the victim and they still remained conscious?"

Answer: "Depending upon the sequence of when they were delivered, some of them yes, but most of them no. Almost all of these, certainly those that result in depressed fractures, you don't remain conscious with those."

"But the fractures that were not depressed, you can remain conscious with those?"

Answer: "For example, fractures to the nose, you could be conscious even after that. Even the fracture to the forehead is somewhat problematic, but certainly all of the others, you are not going to be conscious with those."

And then going to Page 65, Dr. Keen's testimony, beginning at Line 16.

"Dr. Keen, in your experience, is this an exceptionally vicious attack?

Answer: "I would say yes."

Question: "And what made it so?"

Answer: "The multiplicity of these injuries to the head, when clearly, even to a lay observer, this person will become helpless after one."

Question: "And I understand your earlier testimony it was your belief that, given your long experience with these kinds of things, with these kinds of attacks and autopsies to the victims of these kinds of attacks, that those injuries to the forearm in that flexed position, those were basically defensive-type injuries?"

Answer: "I classified them as consistent with defensive injuries, yes, sir."

Question: "Have you ever seen those

kinds of injuries in a situation where they weren't defensive?"

Answer: "I don't think across a contracted joint, no, I don't think so."

"And if I understood your testimony, it was your opinion that as a result of those injuries being defensive in nature, then the victim was conscious at the time they received those injuries?"

Answer: "Yes, sir."

Question: "And thereafter, of course, was suffering as a result of receiving those injuries?"

Answer: "Yes, sir."

That addresses, of course, both the cruelty aspect of this brutal killing and also the depravity aspect.

And in regard to the F-2 aggravator, which was saved for the last, I would suggest that was saved for the last because clearly there was no law to support the defense argument, and it was illogical.

The defense suggested that every murder is an armed burglary? That is absurd.

Finally, in regard to the aspect of pecuniary gain -- the aggravator of pecuniary gain, this is in evidence before the Court as Exhibit No. 65. Yes, 65. Last paragraph of this e-mail from Steven DeMocker to Carol

Kennedy, copied, apparently, to Anna Young.

"My preference would be to complete the execution of our decree without any further -- plus, plus, plus, Y or contest -- and specifically for us to exchange checks tomorrow for the amounts we owe each other as of today. I owe you $6,000 in spousal support, and you owe me half of the excess amount above. If you will not exchange checks, and in the absence of other agreement between us, I will need to need to deduct the balance you owe me from your next monthly support statements. I simply cannot float a payment to you this month without your payment to me."

There is ample support in this probable cause hearing to sustain each and every one of these aggravators, Your Honor, and I would ask that the Court find so. Thank you.

THE COURT: Thank you, Mr. Butner.

We had talked about December 9 as a possibility for some further hearing. Remind me what the issue was that we are putting off to the 9th.

MR. SEARS: Jury selection, jury poll, Your Honor, as well as the time that you had previously given us on the 15th. I think you moved to the afternoon that day. And we think we could wisely use all of that time, Your Honor.

THE COURT: So are you looking for -- and are

you available on December 9 at 1:30?

MR. SEARS: Yes, Your Honor.

THE COURT: Let me make sure no one has put anything in there in the meantime.

Looks like the 1:30 time is still available on December 9, so I will -- Mr. Butner, I didn't ask if you were available. I think you indicated you had a trial but it went off?

MR. BUTNER: It did, Judge, and I am available.

THE COURT: Then our next hearing will be set for 1:30 on December 9, 2009.

Mr. Sears.

MR. SEARS: We also, then, have some time on the 15th, as well, Your Honor?

THE COURT: Yeah.

MR. SEARS: Same start time or later?

THE COURT: I think same start time. Bear with me a second. Something got plugged in there. No, can't do that. I think I already have a 1:30 to 3:30 on that day.

How much time are you looking for on the 15th?

MR. SEARS: As much as you have.

THE COURT: As much as I have.

MR. SEARS: We think the work will expand to

fill the available time, Your Honor.

THE COURT: It seems to work that way, doesn't it -- or sometimes beyond.

Currently, I have the Clark case at 1:30 to 3:30.

I have some time available, it looks like, at 11:00.

MR. SEARS: My recollection was we were originally scheduled for maybe an hour and a half at 8:30. I thought we had talked, maybe yesterday -- maybe we weren't looking at the right things about moving it to the afternoon. You thought you had a bunch of stuff that morning on the 15th, also.

THE COURT: I do have some things on the morning, also. I can start you at 11:00.

MR. SEARS: Do you think you have a trial that starts on that Wednesday?

THE COURT: I currently have two trials on that Wednesday. I sent out a missive to the lawyers to see where we stand on it. I haven't personally heard back. The J.A. may have, by now.

MR. SEARS: So we may not have any time on the 15th?

THE COURT: No, on the 16th. The 15th is Tuesday. Wednesday is when the trial starts. I have half an

hour where it's currently set at 8:30. I have an hour at 11:00, I have an hour and a half at 3:30, I think. So it is kind of scattered. It is on the same day. Maybe I can move some other stuff.

MR. SEARS: Maybe we can take the bits and pieces in the afternoon and hope that something happens to whatever you have in the middle.

THE COURT: Or alternatively, maybe I can get with the other lawyers and consolidate things in the morning.

MR. SEARS: If we could get several hours, even if they weren't all in a line on the 15th, that would be good.

THE COURT: I will see what I can do about moving the afternoon one into the morning, for example, see if that might work with the defense attorney and prosecutor in the case.

MR. SEARS: Your Honor, I had asked if you had time and the inclination to be heard, again, very briefly under the advisement motion.

THE COURT: You wanted to add something? Go ahead.

MR. SEARS: Thank you, Your Honor.

We've had a number of conversations, most of them either informal or sometimes even off the record about this matter, and the Court has reminded us that the

time for ruling is coming on us very quickly here. And as a result, I went back and read the rule again, which is in my experience always a good thing for me to do. It reminds me of what the law actually is without me trying to remember what I think the law is.

And I had gotten confused, frankly, Your Honor, and thought for some reason that Rule 7.4(B) had some component in there that required us to show a change in circumstances to get, not only a hearing, but also to get Mr. DeMocker's conditions modified.

But as I read 7.4(B), again, it says that any party may move when the motion alleges the existence of material facts not previously presented to the Court. And that caused me to think, again, about what we presented and what I think has happened in the interim that the Court knows about that could be part of the Court's consideration.

And when we filed our motion and had our hearing, some months ago now, certainly one of the material facts that we presented at that time that had not previously been presented was the additional information we gave you about the active GPS monitoring system, which was, I think, much more detailed and precise and different than the general information we gave you at the first release motion about passive GPS monitoring, and we think that is significant.

But I think most significantly in the two

months or so that this matter has been under advisement -- less than two months -- clearly less than two months.

THE COURT: Thank you.

MR. SEARS: You now heard from Katie and Charlott in this case for a number of circumstances that the Court knows much about. But their statements and their position we think are very important, obviously, for the emotional impact of them and the degree to which they are speaking from their heart about this case and their father and what their father's absence and the prospect of his continued absence means. I can't imagine that the Court has not taken that into consideration.

But I think that has another effect on the circumstances here, which is new and material, which the real question of whether Mr. DeMocker would flee. I cited in my motion to a very old case -- nearly as old as Mr. Hammond and me -- that has been the law for half a century that says that the sole purpose of bond is to procure the attendance of the defendant at each and every court proceeding, and that any amount of bond or condition that is more than necessary to guarantee the defendant's appearance is excessive and violates the Constitution.

And I think the relationship between the State and the DeMocker girls and that issue is this, Your Honor: The idea that Mr. DeMocker would flee and forever

leave his children in the face of what they said in his presence and within his hearing about their belief in him and their love for him and their belief in his innocence is something I can't conceive of. I just can't conceive of how anybody could believe that Mr. DeMocker would do that.

I remind the Court, and the Court's already noticed that Mr. DeMocker, of course, was sitting at his desk on the day he was arrested, despite the efforts of the Sheriff's Department to spook him with a planted story in the newspaper.

The Court knows what it knows about the books and about the other things that the State says constitute evidence of flight. I think we're all governed, largely, by the idea that the best predictor of people's behavior is what they actually do, not what other people think about them. And what Mr. DeMocker did was, in the face of his mounting drum beat that his arrest was imminent, to make a conscious decision to stay.

What did he tell the police when he was arrested? We've heard that story. He said that his decisions were stupid and fear-based to get those trashy books that he got -- I don't know if the Court's had an opportunity to look at -- but in the end, he wasn't going to go anywhere.

But I think most importantly, Your Honor,

the change in circumstances is the fact that there is no change. And I don't think I did a very artful job of explaining this two months ago. I'll try and do it now.

The evidence against Mr. DeMocker at the beginning was the evidence. The State has dressed it up, shifted it around, manipulated it, but the evidence is the same. The only physical evidence in this case points away from Mr. DeMocker and to one or more other people.

The biological evidence points away from Mr. DeMocker, and Mr. DeMocker knows that.

There is no presence detected by law enforcement of Mr. DeMocker in that house, a fact which is somewhat strange to us, frankly. Mr. DeMocker lived in that house, he built that house, he visited there. It wouldn't have surprised us if some piece of Mr. DeMocker -- a hair or a fingerprint or something was in-house, but the State has not found anything like it.

And we now know, this week and last week, that the State is realizing for the first time, apparently, that there are important items of evidence -- not evidence that they found last week, but evidence found touching Miss Kennedy's body that has never been analyzed. Evidence that clearly to my eye, which is by no means trained, something that has evidentiary value is just now being analyzed.

And this idea that the State is at that

stage in this case, still needing to do basic investigation and to run out to places and look for things and look for people and test things, while Mr. DeMocker sits in jail, away from his children, away from his family, without his freedom, is I think an important fact. So the fact that the evidence hasn't changed, the fact that the evidence is no stronger today than it was when you found that he had not hit the proof evident, presumption great standard, is a circumstance that needs to be considered.

This case has taken a very long time to get to this point. But if it proceeds as a death penalty case for some reason, even in the face of that, Your Honor, even if somehow this case goes on in that factor, Mr. DeMocker is not going anywhere. We have put together a proposal of bonds that would be a terrible financial burden on his family, who have suffered financially already in this case, a fact that would not be lost on Mr. DeMocker.

He knows that his children are there. They love him and support him. The concept that Mr. DeMocker would run away from his children seems impossible to understand. It would be a reason for him to stay.

But most of all, the idea that he would run away from this case, that he would throw his life and the life of his family and children away for fear that he might be convicted on the evidence in this case is the biggest

impossibility. Mr. DeMocker, each day, knows that the State's case has gotten no stronger, that the State has no evidence that they didn't have on Day 1, that they can test endlessly, that they can search endlessly, they can continue to do things that should have been done, in our view, 15, 16 months ago in this case, and they won't find anything different, because the truth is what it is in this case. The truth is that Mr. DeMocker is innocent.

The idea of a innocent man sitting in jail because he can't make the bond set, we think would cause this Court, we would hope, to reexamine his conditions of release, regardless of ruling, I think, on these death penalty issues. Letting Mr. DeMocker home is no risk to this Court. The Court should not be concerned that Mr. DeMocker will then flee.

There is every good reason for Mr. DeMocker to be here and no good reason for Mr. DeMocker to run away. And we have proposed something in our package of conditions that should give the Court great confidence, that with those circumstances and what I have just said here, Mr. DeMocker will be here every day that he needs to be here until this matter is over and he is restored to his family. Thank you.

THE COURT: Thank you. I am an hour past my other hearing, so I am taking the Chronis matter under

advisement.

MR. SEARS: Thank you.

MR. BUTNER: Judge, I would just like to point one thing out in regard to the release conditions. I have spoken with the victims, Ruth Kennedy and John Kennedy. They are opposed to Mr. DeMocker's release.

THE COURT: Nothing has changed in that regard?

MR. BUTNER: That's correct, Judge.

THE COURT: Thank you.

(Whereupon, these proceedings were concluded.)

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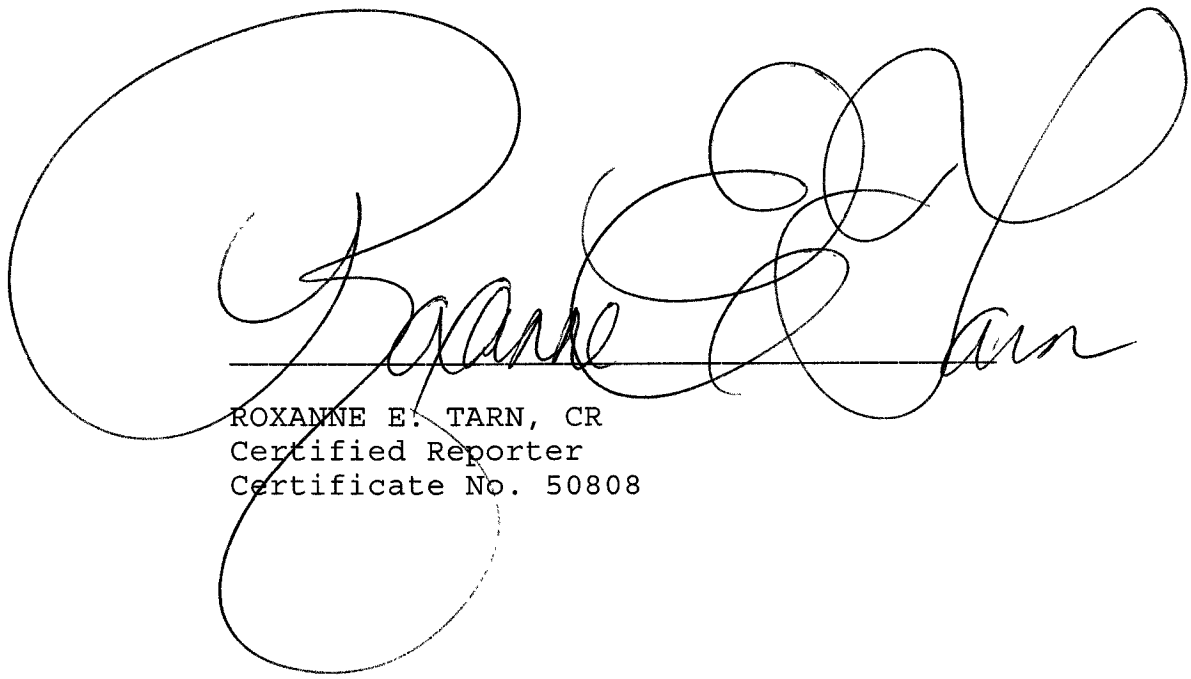
C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages 1 - 84 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 9th day of January, 2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808